

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GEORGE T. PAYNTER,  
Petitioner,  
v.  
RON VAN BOENING,  
Respondent

Case No. C08-5164FDB

# REPORT AND RECOMMENDATION

## Noted for September 19, 2008

This matter has been referred to United States Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(A) and 636 (b)(1)(B), and Local Magistrates Rule MJR3 and MJR4. Petitioner is an individual seeking federal habeas relief, pursuant to 28 U.S.C. § 2254, from a conviction for Second Degree Assault, First Degree Burglary, and First Degree Attempted Kidnapping arising out of the Superior Court for Pierce County, Tacoma, Washington. Petitioner was sentenced to 183 months of confinement. After reviewing the Petition, the Answer, and the balance of the record, the undersigned recommends that the Court deny the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

The Commissioner of the Washington Court of Appeals summarized the following facts surrounding Petitioner's convictions and sentence as follows:

According to the declaration for determination of probable cause, on July 2, 1999, Paynter entered the residence of his former girlfriend, Anita Porter. When she and her new boyfriend, Mark Elmore, returned, he pointed a firearm at them, handcuffed Elmore, and after some other, unreported activity in the residence, forced Porter into the trunk of her car. Thereafter,

1 Porter and her boyfriend escaped, and one or both of them notified police. The State charged Paynter with  
2 second degree assault against Porter and against Elmore, attempted first degree kidnapping, and first  
3 degree burglary, each crime committed while armed with a firearm. Paynter pleaded guilty to those  
4 crimes on February 14, 2000, and the State dropped two counts of the four firearm enhancements. On  
5 February 16, 2000, the court sentenced Paynter to confinement of 183.5 months, based on an offender  
score of 10 and the two firearm enhancements.

6 One year later, Paynter filed a motion to withdraw his guilty plea in the trial court,  
7 claiming that the plea was involuntary. He also argued that one assault, the attempted  
8 kidnapping, and the burglary should merge because they involved the same victim. The  
9 trial court denied the motion, and Paynter appealed. In his pro se brief, he included a claim  
10 that the assault, burglary, and attempted kidnapping were the same criminal conduct. This  
court found no merit in any of the claims presented to the superior court and declined to  
address the issues in the pro se brief because they had not been raised below.

11 Almost two years thereafter, Paynter filed a personal restraint petition, again asserting  
12 merger, and other sentencing errors. This court refused to again address the merger claim,  
13 but held that two 1985 convictions of rape should not have been counted separately. It  
remanded for resentencing.

14 At the resentencing hearing, the parties agreed that Paynter's offender score was 8. The  
15 sentencing court imposed the same sentence, now at the high end, rather than the low end  
16 of the standard range. Paynter appeals, again asserting that the assault of Porter and the  
17 attempted kidnapping were the same criminal conduct. As he did not preserve this issue for  
18 appeal, [footnote omitted] he challenges the competency of counsel in not raising it below.

19 Exhibit 2 of the State Court Record filed along with Respondent's Answer (Commissioner's Ruling  
20 Affirming Sentence, *State v. Paynter*, Court of Appeals Cause No. 34004-6-II, at 1-2).

21 In exchange for the prosecution's agreement to drop two of four firearm sentencing enhancements  
and to recommend a total sentence of 183.5 months (111.5 months, plus 72 months for the sentencing  
enhancements), Petitioner pled guilty to two counts of second degree assault with the firearm sentencing  
enhancements, one count of first degree burglary, and one count of attempted first degree kidnapping.  
The Pierce County Superior Court accepted Petitioner's guilty plea on February 14, 2000, and the court  
sentenced him to 183.5 months total confinement on February 16, 2000.

22 Petitioner did not file a direct appeal from the judgment and sentence; however, on February 16,  
23 2001, he filed a motion in the superior court seeking to withdraw his guilty plea. The superior court  
denied the motion. Petitioner appealed from the superior court's order, and the Washington Court of  
Appeals affirmed the superior court's order denying the motion to withdraw the guilty plea. The  
Washington Court of Appeals subsequently denied Petitioner's motion to extend the time for filing a  
motion for reconsideration. Petitioner requested the Washington Supreme Court to grant an extension of  
time to file a motion for discretionary review. The Clerk of the Washington Supreme Court denied the

1 request, noting Paynter failed to demonstrate extraordinary circumstances that would justify an extension  
2 of time. Petitioner then attempted to file a motion for discretionary review on February 21, 2003. The  
3 Clerk informed Petitioner that his motion for discretionary review and accompanying motion could not be  
4 considered since they were not timely filed. Petitioner moved to modify the Clerk's ruling. The  
5 Washington Supreme Court denied the motion to modify the Clerk's ruling on April 29, 2003, and the  
6 Washington Court of Appeals issued its mandate September 18, 2003.

7       In August, 2004, Petitioner filed a personal restraint petition in the Washington Court of Appeals.  
8 The Washington Court of Appeals granted the petition, in part<sup>1</sup>, found several of the claims procedurally  
9 barred under state law, and did not consider Petitioner's claims regarding merger of the current offenses,  
10 the sentencing enhancements, or the application of the state "washout" provisions because the claims  
11 were raised and rejected by the Washington Court of Appeals in an appeal from the order denying  
12 Petitioner's earlier motion to withdraw the guilty plea. The court also ruled Petitioner's guilty plea  
13 waived the sufficiency of the evidence claim, and it declined to consider issues raised for the first time in  
14 the reply brief. The Washington Court of Appeals denied Petitioner's motion for reconsideration.

15       Petitioner sought review by the Washington Supreme Court on March 23, 2005, when he filed a  
16 Motion for Discretionary Review. The Commissioner of the Washington Supreme Court subsequently  
17 denied review, and the Washington Supreme Court ultimately denied Petitioner's motion to modify the  
18 Commissioner's ruling. The Washington Court of Appeals issued a certificate of finality on August 3,  
19 2005.

20       The trial court resentenced Petitioner in October 2005. The prosecution made the same  
21 recommendation as it did during the original sentencing hearing, 183.5 months of total confinement  
22 (111.5 months on the kidnapping charge, plus 72 months for the firearm sentencing enhancements).  
23 Exhibit 36, at 3. Recalculation of Petitioner's offender score from 10 to 8 placed the recommended  
24 sentence within the statutory standard range, and the trial court resentenced Petitioner to the  
25 recommended sentence of 183.5 months. Petitioner appealed from the new judgment and sentence. The  
26 Commissioner of the Washington Court of Appeals affirmed the sentence. See Exhibit 2 (Ruling  
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28       <sup>1</sup>The court concluded that the trial court erred in calculating Petitioner's offender score by counting separately two 1985  
second degree rape convictions, and the court remanded the matter to the trial court for resentencing.

1 Affirming Sentence). The Washington Court of Appeals denied Paynter.s motion to modify the  
2 Commissioner's ruling. Exhibit 39, Motion to Modify, *State v. Paynter*, Court of Appeals Cause No.  
3 34004-6-II; Exhibit 40, Order Denying Appellant.s Motion to Modify, *State v. Paynter*, Court of Appeals  
4 Cause No. 34004-6-II.

5 Petitioner sought review by the Washington Supreme Court. Exhibit 41, Motion for Discretionary  
6 Review, *State v. Paynter*, Supreme Court Cause No. 79910-5. Petitioner expressly wrote: "The only issue  
7 I am presenting to this Court is weather [sic] or not my Assault and Kidnapping should be considered as  
8 Same Criminal Conduct for sentencing purposes. That, has been argued and not answered by the Court of  
9 Appeals." Exhibit 41, at 1-2. Petitioner presented this issue as an error of state law. Exhibit 41. The  
10 Washington Supreme Court denied review on January 8, 2008. Exhibit 42, Order, *State v. Paynter*,  
11 Supreme Court Cause No. 79910-5. The Washington Court of Appeals issued its mandate on March 7,  
12 2008. Exhibit 43, Mandate, *State v. Paynter*, Court of Appeals Cause No. 34004-6-II. The Commissioner  
13 of the Washington Supreme Court denied review. Exhibit 32, Ruling Denying Review, *In re Paynter*,  
14 Supreme Court Cause No. 76817-0.

15 Mr. Paynter's instant Petition presents this Court with the following four grounds for habeas  
16 corpus relief:

- 17 1. A due process violation for [sic] because the trial court failed to merge counts II and III.
- 18 2. A double jeopardy violation.
- 19 3. An equal protection violation.
- 20 4. 2 ex post facto violations.

21 Petition (Doc. 8), at 5-6.

## 22 DISCUSSION

### 23 A. EXHAUSTION AND PROCEDURAL BAR

24 As a threshold issue the Court must determine whether or not petitioner has properly presented his  
25 federal habeas claims to the state courts. In order to satisfy the exhaustion requirement, petitioner's  
26 claims must have been fairly presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 276  
27 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). A federal habeas petitioner must  
28 provide the state courts with a fair opportunity to correct alleged violations of prisoners' federal rights.

1     Duncan v. Henry, --- U.S. ---, 115 S.Ct. 887, 888 (1995). It is not enough that all the facts necessary to  
2 support the federal claim were before the state courts or that a somewhat similar state law claim was  
3 made. *Id.*, citing Picard v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459 U.S. 4 (1982).

4                 The undersigned has compared the issues raised in the instant Petition to those issues raised by  
5 Petitioner at the state level during his collateral appeals.

6                 As noted above, Petitioner presented issued to the Washington Supreme court on three separate  
7 occasions. The first time was on February 21, 2003, and the Washington Supreme Court denied  
8 Petitioner's request to review the Appellate Court's decision on his motion to withdraw his guilty plea  
9 because it found the matter untimely. The motion presented to the Washington Supreme Court contained  
10 the following issues:

- 11                 1. A faulty Arresting Warrant.
- 12                 2. The use of washout prior's, [sic] and or, not counting the prior [sic] felony as one point.
- 13                 3. Weapons enhancements ran Consecutively of each other instead of concurrently of each  
14 other, with a concurrently ran base sentence.
- 15                 4. Ineffective Assistance of Council.

16                 Exhibit 18 at 1.

17                 The second time, Petitioner sought review with the Washington Supreme Court was on March 23,  
18 2005, when Petitioner filed his Motion for Discretionary Review, associated with his August 2004 PRP.  
19 Appearing on his own behalf, Petitioner's motion for discretionary review presented the following issues  
20 to the Court:

21                 I have brought before the court Constitutional violations in several forms and  
22 fashions, with no relief thus far. I ask this court to look at the violations for what they are,  
23 and not the way they have been presented because I am not an attorney and have not the  
24 proper education to properly present my claims. Case in point, in a very unorthodox  
manor I made claims, to support my 7.8 motion to withdraw my plea, to the ones I make  
now, but without the constitutional violations being the prominent point, as I do in my PRP  
before this court now. The superior court is asking that I be bared [sic] from relief because  
of that [sic] similarities in my issues, from my direct appeal to my PRP.

25                 In the pursuit of justice I ask this court to review the violations the court of appeals  
26 would not.

27                 1. The ex post facto application of amendments to the wash out provision's [sic]  
28 that are NOT allowing my priers [sic] class "B" felony's [sic] to wash-out. 2. The double  
jeopardy and/or due process violation surrounding the way in witch [sic] the weapon  
enhancements were add [sic] to my sentence. 3. The due process violation that led to an  
equal protection violation, by charging me with burglary. Other issues not with

1 constitutional violations I would like look [sic] at are; the courts [sic] failure to merge the  
2 charge of assault and attempted kidnapping of the same victim at the same time and place.  
3 The perjury evidence I got AFTER my plea agreement, that put a grate [sic] deal of doubt  
4 on the states [sic] key element for the burglary charge, and I might add the hole [sic]  
5 reason I first tried to have my plea withdrawn, ve-a [sic] a 7.8 motion, the courts also  
6 denied, without a formal hearing. See appendix F, App. No. 27994-1-II, January 10, 2003.

7 Exhibit 31, at 2-3. The Commissioner agreed with the Washington Court of Appeals that Petitioner's  
8 claim concerning "washed out" convictions, and his claim regarding possession of the firearm were  
9 barred since the claims were raised and rejected in the appeal from the denial of the motion to withdraw  
10 the guilty plea. Exhibit 32, at 1-2. The Commissioner also agreed Petitioner's guilty plea waived the  
11 claim challenging the burglary conviction. Exhibit 32, at 2. The Commissioner agreed the "same  
12 criminal conduct" claim was without merit. Exhibit 32, at 2.

13 The third and last time Petitioner presented any issues to the Washington State Supreme Court  
14 was on January 9, 2007, in connection with Petitioner's appeal of the trial court's resentencing. Petitioner  
15 stated the following in his motion, "The only issue I am presenting to this Court is weather [sic] or not my  
16 Assault and Kidnapping should be considered as Same Criminal Conduct for sentencing purposes. That,  
17 has been argued and not answered by the Court of Appeals." Exhibit 41 at 1-2. The Washington  
18 Supreme Court denied review and the Court of Appeals issued a Mandate on March 7, 2008.

19 After carefully reviewing the parties' arguments and the state court records, the undersigned finds  
20 Petitioner failed to properly exhaust his claims because he did not fairly present the claims to both the  
21 Washington Court of Appeals and the Washington Supreme Court as federal claims. First, Petitioner did  
22 not properly exhaust any of his claims on the appeal from the denial of the motion to withdraw the guilty  
23 plea. Although Petitioner presented claims to the Washington Court of Appeals, he did not then fairly  
24 present the claims to the Washington Supreme Court in a timely petition for discretionary review.

25 Second, when Petitioner attempted to pursue his claims in his August 2004 PRP, the state courts  
26 found the claims were procedurally barred under state law. The courts refused to consider claims that had  
27 been rejected by the Washington Court of Appeals in the prior appellate proceeding, refused to consider  
28 claims raised for the first time in the reply brief, and refused to consider the claim that had been waived  
by the guilty plea. The only claims found not to be barred were two state law claims, and the court  
granted relief on one of those two claims. Petitioner did not properly exhaust any federal claim in those  
proceedings.

1        Third, Petitioner did not present any federal claim to the Washington Supreme Court in the appeal  
2 from the trial court's resentencing. Instead, Petitioner specifically limited his petition for review to a  
3 single state law issue. Paynter did not properly exhaust any federal claim in that proceeding.

4        Accordingly, the court finds Petitioner did not properly exhaust any federal claim in compliance  
5 with the procedures established by state law. Since Petitioner failed to properly exhaust his claims, and  
6 the state courts found the claims to be procedurally barred under Washington law, the claims are not  
7 cognizable absent a showing of cause and prejudice or actual innocence. Petitioner did not sufficiently  
8 demonstrate either cause and prejudice, or actual innocence, and therefore, his claims are not cognizable  
9 in federal court.

10                          CONCLUSION

11        Because Petitioner failed to fully and fairly present his federal claims for habeas relief at the state  
12 level, he has failed to properly exhaust his federal habeas claims. Pursuant to 28 U.S.C. § 636(b)(1) and  
13 Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of  
14 this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a  
15 waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating  
16 the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
17 **September 19, 2008**, as noted in the caption.

18        DATED this 27th day of August, 2008.

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20                          /s/ J. Kelley Arnold  
J. Kelley Arnold  
21                          United States Magistrate Judge  
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